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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Price Cap Performance Review) CC Docket No. 94-1
for Local Exchange Carriers)

DEC 11 1995

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COMMENTS OF
MFS COMMUNICATIONS COMPANY, INC.
IN RESPONSE TO LEC PRICE CAP PERFORMANCE REVIEW

MFS Communications Company, Inc. ("MFS"), by its undersigned counsel and pursuant to the Commission's *Second Further Notice of Proposed Rulemaking*,^{1/} hereby respectfully submits its Comments in response to the Commission's Review of local exchange carriers' ("LECs") Price Cap Performance in the above-captioned proceeding.

I. INTRODUCTION

MFS supports the Commission's efforts to respond to changes in the market for interstate access services and agrees that the promotion of competition is the surest means to achieve public benefits. However, MFS is concerned that, through the Commission's significant proposed revisions to its Price Cap plan for ("LECs"), the Commission may to alter existing pricing regulations before competition has yet arrived. Any revisions to the LEC Price Cap rules must adequately address the dangers inherent in premature deregulation of LECs. Premature

^{1/} *Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1, FCC 95-393 (released Sept. 20, 1995) ("*Price Cap NPRM*").

deregulation threatens the development of competition, which will cause consumers to be harmed by LEC monopoly pricing practices. Moreover, granting LECs increased pricing flexibility prematurely will make it more likely for LECs to engage in cross-subsidization, predatory pricing and other anticompetitive practices in order to gain an unreasonable advantage over their competitors. This potential for LEC competitive abuse makes it imperative for the Commission to preface new pricing flexibility for the LECs *only upon a showing of actual competition*, and to require full cost justification for all new services, as well as for alternative pricing plans.

II. RESPONSE TO PROPOSED REVISIONS

A. The regulatory treatment of new services (Issue 1a):

The Commission should not relax regulation of “new” services introduced by LECs, and should retain the Price Cap rules currently in place. MFS’ concern is simply put -- service definitions are easily manipulated, and if new services were accorded less stringent regulatory treatment, LECs could easily reclassify existing services as “new” in order to evade regulatory scrutiny. NYNEX’s “Enterprise” family of services is an example. Over the last several years, NYNEX has introduced a range of products that employ multiplexers within the NYNEX network or on the customer’s premises in what NYNEX classifies as a unique configuration. In many applications, these Enterprise services may be directly substitutable for tariffed private line services ranging from digital data services to high capacity services. Under the existing Price Cap rules, NYNEX was required to submit cost data to demonstrate the reasonableness of its Enterprise service rates. Absent such a requirement, any LEC could modify a minor technical

aspect of an existing service, classify it as “new” and evade the tariff review process.

Moreover, the Commission should clarify that LECs support new services with a cost showing similar to that required in the pending investigation of LEC virtual interconnection tariffs in CC Docket Nos. 91-141 and 94-97. In that proceeding, the Commission found that certain LEC high capacity services were functionally similar to expanded interconnection services, and determined that it was unlawful for LECs to use disparate levels of overhead loadings in establishing rates for the two categories of service.^{2/}

This same approach requires that LECs file similarly detailed cost data regarding their new services. Indeed, many of the new services introduced by LECs will be targeted for users with competitive service alternatives available to them. As a result, these services will compete directly with services provided by competitive entities through expanded interconnection arrangements, and it is likely that competitive carriers will seek cross-connection to these new services through their expanded interconnection arrangements.^{3/} The detailed cost data required in CC Docket Nos. 91-141 and 94-97 were the only tool that the Commission and interconnected competitors had to evaluate the reasonableness of the LEC expanded interconnection rates. The importance of these data is evident from the Commission’s finding that the majority of the LECs

^{2/} *Ameritech Operating Companies Revisions to Tariff F.C.C No. 2, et al.*, 10 FCC Rcd. 1960, 1971 (1994) (“*Virtual Collocation Tariff Suspension Order*”).

^{3/} *MFS Communications Company, Inc. Petition for Declaratory Ruling That Interconnector Access to LEC Services May Not Be Restricted, Expanded Interconnection with Local Tel. Co. Facilities*, CC Docket No. 91-141 (filed Dec. 4, 1995).

filed excessive and unlawful rates for their expanded interconnection services.^{4/} In order to ensure that LECs do not unreasonably discriminate against interconnectors and shift cost from competitive new services to bottleneck expanded interconnection services, the Commission must require the submission of similar cost data for new services.

B. Should the definition of “new services” be amended to exclude alternative pricing plans (“APPs”)? (Issue 1b):

No. MFS has demonstrated that LECs have tariffed volume and term discounted rate structures that provide preferred customers with discounts of as much as 80% off the tariffed rates for undiscounted high capacity services, while refusing to provide similar discounts for competitors that purchase their expanded interconnection services. As MFS has shown, this policy denies interconnected competitors the benefits of the economies of scale and scope and reduced transaction costs that their high capacity purchases generate, and so unjustly enrich the LECs. MFS has asked the Commission to require LECs to tariff discounted rate plans for their expanded interconnection service, and this issue is now before the Commission in its pending investigation of the LEC virtual interconnection tariffs.^{5/} Because volume and term APPs raise the same concerns over discrimination and unlawful cross-subsidization as new services, the Commission should accord APPs the same treatment, and require full and detailed cost support for all LEC filings introducing new APPs.

^{4/} *Local Exchange Carriers’ Rates, Terms, and Conditions for Expanded Interconnection Through Virtual Collocation for Special Access and Switched Transport*, 10 FCC Rcd. 6375, 6376-77 (1995) (“*Virtual Collocation Report & Order*”).

^{5/} *Local Exchange Carriers’ Rates, Terms, and Conditions for Expanded Interconnection Through Virtual Collocation for Special Access and Switched Transport*, 10 FCC Rcd. 11116 (1995) (“*Virtual Collocation Designation Order*”).

C. The regulatory treatment of alternative pricing plans (Issue 2a):

In addressing the regulatory treatment of APPs in the future, MFS stresses that LECs must apply all APP terms and rates in a nondiscriminatory manner. The Commission must state, as a matter of policy, that LECs must provide their competitors with the same rates and terms that they provide to similarly situated end user and interexchange carrier customers; and this requirement must be enforced through the tariff review process. The LECs have made clear that they will discriminate against their competitors if given a chance: as discussed above, all of the LECs have rejected MFS requests to tariff the same volume and term discounts for expanded interconnection that they routinely provide to their high capacity customers; similarly, MFS has demonstrated that many LECs discriminate against customers of interconnected competitive access providers in the application of nonrecurring charges.^{6/}

It is clear that, as interconnection-based competition grows, and as new services and new pricing structures are introduced, LECs will continue in their attempts to gain a competitive advantage by discriminating against competitors and in favor of their preferred end user or IXC customers. The only weapon available to competitors and to the Commission to prevent such an anticompetitive practice is the requirement that LECs provide adequate service description information and cost data. Only this information will allow the Commission and interested parties to determine whether new services or APPs are “like” LEC services that must be purchased by competitive service providers.

^{6/} *MFS Communications Company, Inc. Motion for Declaratory Ruling Proscribing Discriminatory Application of Local Exchange Carrier Nonrecurring Charges, Expanded Interconnection With Local Telephone Company Facilities*, CC Docket No. 91-141 (filed May 15, 1995).

D. The regulatory treatment of individual case basis (“ICB”) pricing arrangements (Issue 3):

The Commission should retain its policy on ICB pricing as recently reiterated in its *Public Notice*.^{7/} In that order, the Commission reiterated that ICB pricing is only appropriate for new or very limited service offerings that do not generate enough cost or demand data to enable the tariffing of averaged rates. This position reiterates the Commission’s well-established position on ICB pricing by LECs, and is informed by the three-year investigation into the pricing practice that was conducted in CC Docket No. 88-136.^{8/} In that proceeding, MFS and other parties produced irrefutable evidence that LECs were using ICB pricing to establish discriminatory and anticompetitive rates for competitive high capacity services. The Commission expressly found that LEC ICB pricing had resulted in unreasonably discriminatory rates, and prohibited the use of ICBs except in very narrowly defined circumstances.^{9/} As competition grows, the LEC incentive to discriminate will increase, making the Commission’s current ICB policies even more necessary to protect customers and competitors from unreasonable LEC pricing practices.

E. When should LECs be accorded new pricing flexibility? (Issue 10a):

LECs should be accorded new pricing flexibility only upon a showing that actual

^{7/} Common Carrier Bureau Restates Commission Policy on Individual Case Basis Tariff Offerings, *Public Notice* (Sept. 27, 1995).

^{8/} *Local Exchange Carriers’ Individual Case Basis DS3 Service Offerings*, 4 FCC Rcd. 8634 (1989); *Local Exchange Carriers’ Individual Case Basis DS3 Service Offerings*, 5 FCC Rcd. 4842 (1990).

^{9/} *Id.*

competition has been established. In making this determination, the Commission should review the growth of competitive service, but should also premise any additional flexibility on the elimination of barriers to competition. To this end, MFS promotes the use of the competitive checklist proposed by the Department of Justice in its evaluation of the Ameritech "Customers First Plan." MFS discusses these criteria in greater detail in the comments that it is filing today in CCB-IAD Docket No.95-110, and incorporates those arguments herein by reference.

F. The use of "supply responsiveness" in measuring competition (Issue 15b):

The available supply of service to a given area is an unreliable and ineffective measure of competition for several reasons. First, LECs may dominate a market despite the availability of telecommunications capacity from other sources. This currently is the case in all markets in the country, despite the fact that significant alternative supply has developed in a few markets. Moreover, the measure of supply is inexact and misleading. Fiber optic cable, for example, has theoretically unlimited capacity, and -- in theory -- a single fiber network presumably has the capacity to provide service to an entire service area. This available capacity says nothing about the nature of competition in a given market, however, and is irrelevant to an examination of LEC market dominance.

The measure of potential competition is irrelevant because potential competition alone is inadequate to impose market discipline and prevent unreasonable LEC pricing practices. Indeed, as the Commission has found in its investigation of LEC ICB pricing practices in CC Docket No. 88-111 and in its investigation of LEC expanded interconnection tariffs in CC Docket Nos. 91-141 and 91-213, the presence of actual competition -- limited as it is -- has been inadequate to prevent LECs from establishing excessive or unreasonably discriminatory rates. In light of these

findings, any argument that the existence of potential competition can guarantee reasonable LEC behavior clearly must be rejected. LEC pricing flexibility must be premised solely on actual competition.

G. LEC pricing below Price Cap ceiling as an indication of competition (Issue 15d):

The setting of LEC service rates below their allowed Price Cap ceiling over an extended period of time should not be used as a benchmark for allowing additional LEC pricing flexibility. Such a pricing practice is too easily manipulated by a LEC that may desire increased pricing flexibility. Indeed, sustained pricing below the allowed ceiling may be evidence of predatory pricing by LECs. As with the answer to Issue 15b, above, there are no credible substitutes for an examination of the status of actual competition, and nothing short of actual competition is adequate to impose market discipline on LEC pricing practices.

H. Contract carriage pricing flexibility for LECs (Issue 16a):

Contract carriage pricing is so easily manipulated by LECs that it is effectively identical to individual case basis pricing. LECs may easily alter a mix of services, or apply unique terms, to craft an offering that only has practical application to a single customer. Because this practice is so simple to manipulate, contract carriage flexibility, if provided to a LEC with market power, will invariably lead to the same anticompetitive abuses that the Commission found in its investigation of LEC ICB pricing for high capacity services.

Contract carriage may be appropriate for LECs at some point in the future. In this regard, the Commission should apply the same standards that it applied to AT&T. That is, contract carriage flexibility should only be accorded to LECs upon a determination that robust competition has developed in the relevant market, and that competitors have established a

substantial presence.

I. Procedures for implementing streamlined LEC regulation (Issue 17):

Streamlined LEC regulation should only be permitted following a finding of actual, effective competition. This finding should rest on the growth of a competitive presence and on the elimination of barriers to competitive entry. MFS discusses these standards in its comments filed today in the Commission's proceeding in CCB-IAD Docket No. 95-110, and adopts that discussion herein by reference.

J. The adoption of rules governing a finding of LEC nondominance (Issue 18):

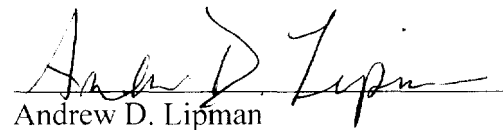
The Commission should not adopt rules concerning a finding that a LEC is nondominant at this time. Rather, the Commission should first adopt standards for measuring the status of competition currently being considered in CCB-IAD Docket No.95-110. After it has adopted these rules, and has some experience in analyzing and measuring the level of actual competition in a relevant market, it will be appropriate to determine how such data may be applied to a finding of nondominance.

If the Commission does adopt such rules in this proceeding -- and MFS reiterates that it would be premature to do so -- the Commission should not adopt rules that would find a LEC to be nondominant in the provision of a specific service or in a specific geographically limited market. Such piecemeal deregulation would provide the LECs with carte blanc to engage in cross-subsidization and would do severe harm to competitors.

III. CONCLUSION

For the foregoing reasons, MFS respectfully requests that the Commission amend its proposed modifications to the LEC Price Cap system to include those revisions suggested by MFS, in order to avoid irreparable injury to emerging competition and potential LEC anticompetitive abuses, in accordance with the discussion contained herein.

Respectfully submitted,



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December 11, 1995

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of December 1995, copies of the foregoing
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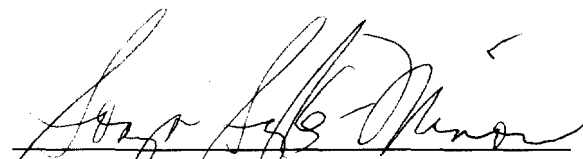
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